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In the Supreme Court

of the United States

OCTOBER TERM, 1977

No. 77-1134

UNITED STATES OF AMERICA,

Appellee,

- vs -

STATE OF MONTANA; DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; and W. A. GROFF, Director of Revenue of and for the State of Montana, and his successors in office,

Appellants.

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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Pursuant to Rule 16(4) of the rules of this Court, the Appellant, the State of Montana, files its Brief in opposition to Appellee's Motion to Affirm.

— STATEMENT —

The notice of appeal in this action was filed on December 15, 1977, thereafter on February 13, 1978, the Appellant filed its Jurisdictional Statement which was received and served on the United States on February 21, 1978. On April 6, 1978, Appellee requested a fourteen day extension to and including April 26, 1978 within which to file its response. On April 7, 1978 by letter from the Clerk of this Court,

the request was granted. On May 5, 1978, ten days after the date set for filing said responsive pleading, the Motion to Affirm was filed by Appellee. Appellants were served with said Motion on May 8, 1978. On May 10, 1978, Appellants filed by way of a telegraphic message, a request of this Court to postpone consideration of the matter until May 18, 1978 giving the Appellants an opportunity to file their brief in opposition to the Motion to Affirm.

ARGUMENT

ECONOMIC IMPACT OF TAX NOT SOLELY ON FEDERAL GOVERNMENT

The basic theme of the Appellee's Motion to Affirm (M.A.) is that the economic impact on the State of Montana is wholly illusory. Hence there is no check or balance on the state taking advantage of the federal government by increasing the tax and discriminating against the federal government.

Such argument ignores the essential fact that the tax is on all Montana public contractors. Any economic impact that the tax might have on a public property owner is borne not only by the state and the federal government but by every public body, including but not limited to every school district, special improvement district, city, county, irrigation district, or any other public board, body, commission or agency which constructs public works in Montana. (Sec. 84-3501, R.C.M. 1947, as amended).

It simply is not true that the gross receipts tax paid to the State of Montana, by a contractor building a sewage lagoon for the incorporated hamlet of Whitehall, Montana, somehow beneficially filters

down to the City of Whitehall in a "right hand pocket to left hand pocket" transfer.

The vast host of non-state, non-federal public projects in Montana (every public construction job above $1,000) provides a reliable intense and vocal bulwark which obviates the concerns raised by the Appellee. There is no more tax and expense conscious entities in our society than school boards, rural town councils and irrigation district boards.

These non-state and non-federal public entities are the "other similarly situated constituents of the State" required by Fresno[1]. They share any economic tax impact with the state and federal governments and insures that the state legislature will not utilize a discriminatory tax on the federal government alone. Every school board member is an intensely motivated private taxpayer acting as a fiduciary for his fellow taxpayers. The governing bodies of these non-state, non-federal, public entities are the tax-alert distillation of the citizens of Montana whom the Appellee claims are unaffected by this tax (M.A. 7). There is more alert and vocal citizen participation through these entities than would result simply because the tax was levied on private contractors. It simply is not true — though it is the basic theme of the Appellee that:

> "The private party pays no tax; the state pays no tax; *only the federal government pays tax.* There is no check to prevent the legislature from raising the tax to oppressive levels. Its citizens will not protest and the state, though it transfers larger amounts of money from pocket to pocket,

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[1] *U.S. v. County of Fresno*, 429 U.S. 452, 50 L.Ed. (2d) 683, 97 S.Ct. ____, (1977)

in the end pays nothing. The federal government pays the tax to the state through its contractors and the discriminatory effect is clear." (M.A. 7)

In truthful and accurate manner the foregoing could be rewritten:

"The private citizen as owner of every school, every sewage, drainage or irrigation district, and owner of every city and SID property feels the economic impact of the tax paid by its contractors. The state likewise feels any economic burden of the tax because there is no grandiose, monolithic State of Montana exchequer; and each bureau or department must budget and account for its own separate funds (as does the federal government). There are checks and balances at the local (school) levels against excessive taxation. The private citizens serving on school boards etc. will protest — and protest most vocally — if the economic impact of the tax on school construction etc. gets out of hand. Tax revenues from the Act are not transferred willy-nilly from pocket to pocket either at the state level or from the state to non-state public entities. The federal government neither solely pays the tax nor does it suffer any economic impact not proportionately shared by non-state public agencies and by the state itself. The tax is not discriminatory."

DECISION INVALIDATES STATE TAX STATUTES

Appellees have failed to satisfactorily refute the contentions raised by the Appellant and the Amici as to the impact of the majority opinion entered in the District Court. As Judge Kilkenny in his dissent pointed out, if the opinion of the majority is allowed to stand, "This reasoning, if followed to its

logical conclusion, would effectively invalidate the state taxes routinely upheld in *Alabama v. King and Boozer,* 314 U.S. 1(1941), and *James v. Dravo Contracting,* 302 U.S. 134(1937)." (J.S. App. 28). In discussing that very quote, the Appellee glibly states that the reasoning cannot be carried to its logical conclusion (M.A. 9). In support of that Appellee argues that if taxes were levied on the private sector there could be no discrimination.

What Appellee is trying to do is re-write the opinion of the majority so as to alleviate the effect of this decision. However, were this Court to grant Appellee's Motion to Affirm, what would remain would not be the argument of Appellee, but the language used by the majority. That language, which occasioned the filing of the Amicus briefs by the 24 states and territories, must be reviewed and decided by this Court.

Implicit in the majority opinion is the following rule: If a state tax results in state revenue the effect of such revenue creates a threshold of discrimination against the federal government because there is no corresponding revenue generated for the federal government to offset the federal government's increased costs. Such language in a decision affirmed by this Court will lead to numerous suits attacking the validity of state taxes using this very theory. It is imperative that this Court take jurisdiction of this matter so as to correct this clearly erroneous holding. The language and reasoning of this decision has created an issue of national importance and requires this Court to assume jurisdiction and decide the question.

ENGLAND DOCTRINE AND COLLATERAL ESTOPPEL

The rationale of *England v. Medical Examiners,* 375 U.S. 411, 11 L.Ed. (2d) 440, 84 S.Ct. 461 (1964) bars reconsideration of this issue. The Appellee misconstrues the holding of *England* supra, and the record as to the control of the Appellee in *Kiewit and Sons, Inc. v. State Board of Equalization,* 161 Mont. 140, 505 P.2d 102 (1975) (*Kiewit* No. 1).

The *England* decision *supra,* does not require the Federal District Court to specifically enter an order of abstention, when, as in this instance the parties, (United States acting by and through Peter Kiewit) by agreement requested an abstention of the federal court proceedings pending a determination in the state court. Further, the record in this matter is devoid of any act on the part of the Appellee which in anyway limited the issues which were submitted to the Supreme Court of Montana in *Kiewit* No. 1. Rather, the Appellee, acting by and through its nominee, Peter Kiewit, freely and without reservation submitted all of its *then known* claims for determination. It wasn't until after the Montana Supreme Court had decided *Kiewit* No. 1 and the second case, *Kiewit and Sons, Inc. v. Department of Revenue,* 166 Mont. 260, 531 P.2d 1327 (1975) (*Kiewit* No. 2) did the Appellee then elect to return to the federal forum and amend its complaint raising "new found" issues. If the rule in *England* is to have application, it must be applied in this situation.

Finally, the specific issue of whether or not the Contractor's Gross Receipts Tax discriminated against the Appellee was raised and decided by the

Supreme Court of Montana in *Kiewit* No. 1, (J. S. App. 119) and under the doctrine of Collateral Estoppel, can not be re-litigated. Appellee chose to have that issue presented to the Montana Supreme Court, contrary to the statement made in its Motion to Affirm (M.A. 12). Appellee has attempted to gloss over this important fact by arguing that in *Kiewit* No. 1 it was not proven that the tax imposed any financial burden on the contractor. Such a position does not respond to the thrust of the issue as clarified by Judge Kilkenny in his dissent (J. S. App. 23) and Appellant's Jurisdictional Statement (J. S. 26), and the Appellee should not be allowed to again re-litigate this question.

CONCLUSION

Appellants move this Court to accept jurisdiction and decide these far-reaching issues.

Respectfully submitted,

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